

Court of Appeals, State of Michigan

ORDER

Theresa Leder v David Leder

Docket No. 275237

LC No. 02-000103

Richard A. Bandstra
Presiding Judge

Brian K. Zahra

Karen Fort Hood
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued June 26, 2007, is hereby VACATED. A new ~~opinion is~~ attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 04 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

THERESA LEDER,

Plaintiff-Appellant/Cross-Appellee,

v

DAVID LEDER,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

October 4, 2007

No. 275237

Macomb Circuit Court

LC No. 02-000103-DM

ON RECONSIDERATION

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her motion to change the custody of the minor children born during her marriage to defendant. On cross-appeal, defendant challenges the trial court's determination that he had been uncooperative with plaintiff regarding legal issues related to the children and the court's imposition of additional requirements to ensure cooperation in the order. We affirm.

I. Basic Facts And Procedure

The parties were divorced by consent judgment in April, 2003. Pursuant to that judgment, defendant was awarded primary physical custody of the parties' two minor children. Plaintiff was awarded a significant amount of parenting time provided that plaintiff seek psychological evaluation and treatment. The parties incorporated a prior order of the trial court, entitled "Order That Parties Cooperate in Parenting Their Minor Children," into the judgment. That portion of the judgment of divorce required the parties to respectfully and courteously communicate with each other regarding issues related to the children. Following the entry of the judgment of divorce, the parties continued to disagree regarding the care of the minor children. Plaintiff alleged that defendant and his new wife fabricated a story that plaintiff hired a hit man to kill them. She alleged that they invented this story to support their attempts to change the children's domicile to Arkansas. Defendant's current wife, Susan Leder, obtained a personal protection order against plaintiff based on these allegations.

The parties also continually argued regarding the amount of child support that plaintiff should be required to pay. Apparently, plaintiff had never maintained employment. She had previously worked at a fast food restaurant for two years, but quit shortly after marrying defendant. Plaintiff lived with her mother and allegedly provided 20 hours of caretaking services

for her a week in exchange for room and board. Plaintiff promised, but never provided, proof that her mother required such full-time care, even though she alleged that her mother suffered from rheumatoid arthritis. In any event, plaintiff refused to seek employment outside of the home. Defendant, on the other hand, made less than \$500 a week as a salesman and often had to rely on his parents to provide free childcare.

Following various motions to change child support and recommendations from the FOC to impute income to plaintiff, the parties entered a consent order in March, 2006, by which plaintiff agreed to pay \$71 each month in child support, \$13 for ordinary healthcare costs, \$20 for the children's health insurance, and 28 percent of the children's uninsured medical expenses.

Plaintiff filed a motion to change the custody of the minor children in October, 2006. Plaintiff alleged that, despite the increase in child support, defendant had neglected the minor children's medical and dental needs by failing to take them to regular dental check-ups for the prior two years and by discontinuing the children's prescription medications without the supervision of a doctor. Plaintiff further alleged that defendant instructed the children's doctors to deny her access to the children's medical records and told the doctors that plaintiff was "crazy." Plaintiff claimed that defendant's actions amounted to a change of circumstances and required the trial court to conduct a hearing to reevaluate the best interest factors related to child custody, pursuant to MCL 722.23.

In response, defendant asserted that the older child was taken off of Strattera because his behavior no longer warranted the prescription. Defendant asserted that he weaned the older child off the medication based on the doctor's instructions. Defendant further asserted that both minor children had never visited a dentist until he was awarded primary physical custody. Defendant admitted that the children did not receive a dental check-up every six months, but asserted that he could not afford the costs of regular visits because he did not have dental insurance. Defendant also admitted that he had not considered orthodontic care for the children because he needed to save funds for such treatment. Defendant denied that he had neglected the children's medical needs and asserted that he sought medical care for the children when warranted. Defendant retorted that plaintiff had failed to provide quarterly reports regarding her psychological evaluations and alleged that plaintiff abused prescription medication.

An FOC referee conducted a hearing on plaintiff's motion in October, 2006. The referee recommended that plaintiff's motion to change custody be denied. However, the referee noted that both parties had been uncooperative regarding legal issues related to the children. The referee recommended that defendant be ordered to supply plaintiff with a copy of the children's health insurance cards and recommended that defendant be ordered to schedule regular dental check-ups and physical examinations for the children. Plaintiff objected to the entry of the recommended order without an evidentiary hearing to reevaluate the best interest factors.

Shortly thereafter, plaintiff filed a supplement to her objection to the recommendation. Plaintiff alleged that defendant cancelled the older child's November, 2006, dental appointment, had not scheduled the ordered doctor appointments, and had yet to provide her with a copy of the children's health insurance cards. Defendant responded that plaintiff had visited the children's dentist office in November, 2006, to retrieve copies of their records. During that visit, plaintiff acted in such a disruptive and aggressive manner that the dentist wrote a letter indicating that plaintiff was no longer welcome in the office. Defendant also provided doctor notes indicating

that the older child had a physical examination and reevaluation regarding his ADHD on November 13, 2006; that the younger child had a physical examination on November 27, 2006; and that the older child had a satisfactory dental check-up on November 20, 2006.

The trial court subsequently conducted a hearing regarding plaintiff's motion for a de novo hearing regarding the best interest factors. At that hearing, plaintiff argued that the referee had determined that defendant's conduct amounted to medical and dental neglect and, therefore, the referee should have found a change in circumstances that warranted a reevaluation of the best interest factors. Plaintiff conceded that defendant had arranged for medical and dental check-ups for the children, but alleged that defendant failed to notify her of the dates so that she could attend. Plaintiff alleged that the older child's doctor recommended that he remain off of Strattera solely because defendant failed to inform the doctor of the child's continuing attention problems at school.

The trial court specifically determined that defendant's conduct did not amount to neglect of the minor children's medical and dental care. The trial court agreed with the referee that the parties had communicated poorly regarding the children's medical appointments. The trial court also agreed that the poor communication did not amount to a change of circumstances requiring a de novo hearing regarding the best interest factors. The trial court then adopted the referee's recommended order, which included requirements that the children receive regular medical and dental care, that the parties cooperate in relation to those appointments, and that defendant provide plaintiff with a copy of the children's health insurance cards.

II. No Change In Circumstances Or Proper Cause For A Change Of Custody

First, plaintiff challenges the trial court's failure to conduct a de novo hearing regarding the best interest factors of MCL 722.23 based on evidence that defendant had neglected the children's medical and dental care.

This Court applies three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). [Citations omitted.]

A trial court may modify a custody award when the moving party establishes that a "change in circumstances" has occurred or when the party establishes proper cause for reconsideration. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000). To establish "proper cause," the moving party must present evidence of "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka, supra* at 511. To establish a "change in circumstances," the moving party "must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Id.* at 513. The moving party must establish something beyond "normal life changes" in order to justify the

court's reconsideration. *Id.* at 513-514. "[W]hen a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Phillips, supra* at 25. However, the trial court may not reconsider the best interest factors until the moving party has established proper cause or a change in circumstances by a preponderance of the evidence. *Vodvarka, supra* at 509. In determining whether a plaintiff has established proper grounds for reconsidering the existing custody order, a trial court may use the best interest factors of MCL 722.23 as a guide. *Vodvarka, supra* at 511-512. MCL 722.23(c) requires the court to consider the "capacity and disposition of the parties involved to provide the child with . . . medical care."

In this case, plaintiff failed to show "proper cause" or a "change in circumstances" in relation to this factor. Defendant asserted that he lacked dental insurance and, therefore, took the minor children to the dentist only once a year and postponed consideration of orthodontic treatment. Defendant maintained the same employment prior to the divorce and, therefore, lacked dental insurance throughout his marriage to plaintiff as well. There is no evidence that plaintiff and defendant took the children to the dentist more frequently when they were married.

In relation to the children's medical treatment, we agree that defendant acted unreasonably in failing to take the older child for follow-up visits after weaning him off of medication for his attention deficit/hyperactivity disorder. Plaintiff testified that the child's condition was so severe that he had been institutionalized in the past. However, there is no evidence that plaintiff would be more capable of providing medical care. Plaintiff was unemployed by choice and lacked medical insurance. Defendant repeatedly asked the trial court and FOC to increase the amount of child support to allow him to pay for the children's medical expenses. In response, plaintiff pleaded poverty. Furthermore, the children are 12 and 14 years old and, therefore, are old enough to tell their parents when they are not well. There is no record indication that defendant neglected to take the children to the doctor when necessary for urgent care. There is also no indication that the children had not received all recommended vaccinations and medical tests. Accordingly, we agree with the trial court that plaintiff failed to show a change in circumstances or proper cause for a change of custody. We also agree with the trial court's determination that defendant had not neglected the children's medical and dental care.

III. Defendant's Cross Appeal

On cross appeal, defendant challenges the trial court's determination that defendant must provide plaintiff with a medical insurance card for the children. Defendant also challenges the trial court's order that the children's routine medical and dental appointments be scheduled at a time mutually convenient to both parents so that they are both afforded an opportunity to attend such appointments.

When reviewing a judgment of the trial court sitting without a jury, we review a trial court's findings of fact for clear error and conclusions of law de novo. In reviewing the trial court's findings of fact, we must give deference to the trial court's determinations of witness credibility. MCR 2.613(C); *GlenLake-Crystal River Watershed Riparians v GlenLake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm

conviction that a mistake has been made.” *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

Defendant argues that plaintiff should not be afforded the opportunity to participate in the children’s routine medical care because of plaintiff’s disruptive behavior. Specifically, defendant claims plaintiff has been barred from the children’s dentist office for aggressive behavior; plaintiff has filed false police reports and child abuse reports against defendant; plaintiff gave the children cell phones containing pornographic material and encouraged the children to make a false abuse report against defendant; plaintiff and her boyfriend demonstrated fellatio to the children; and plaintiff has encouraged her children to make prank phone calls to defendant and his wife that include obscene language.

We note that most of this alleged conduct is irrelevant to the issue of whether plaintiff ought to be afforded a medical insurance card and the opportunity to attend the children’s medical appointments. As long as plaintiff is afforded unsupervised parenting time it is responsible and appropriate for her to have the children’s medical insurance card with her. Moreover, if established as true, the conduct plaintiff is alleged to have committed is the type of conduct a court would consider when determining whether plaintiff should be permitted continued unsupervised parenting time. However, this issue was not before the trial court.

We also observe that many of the allegations raised by defendant against plaintiff are stale and, even if established as true, may not be indicative of plaintiff’s current conduct.

Significantly, we find that the trial court’s factual determination that defendant had been uncooperative with plaintiff regarding the children’s medical and dental care comports with the evidence. The trial court determined that defendant did not neglect the children’s medical and dental needs. However, defendant admitted that he did not inform plaintiff of the younger child’s dentist appointments. Defendant alleged that he notified plaintiff in advance of the older child’s doctor appointments during which he was weaned off of medication and asserted that plaintiff failed to attend those appointments. Defendant conceded that he should take the children to the pediatrician for an annual physical. Given defendant’s admissions and concessions, the trial court’s factual determination that defendant had violated the consent judgment of divorce by failing to cooperate with plaintiff was not clearly erroneous.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood